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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. 2:19-cv-05217-SRB

C.M., on her own behalf and on behalf of her
minor child, B.M.; L.G., on her own behalf and
on behalf of her minor child, B.G.; M.R., on her
own behalf and on behalf of her minor child, J.R.;
O.A., on her own behalf and on behalf of her
minor child, L.A.; and V.C., on her own behalf
and on behalf of her minor child, G.A.,

Plaintiffs,

v.

United States of America,

Defendant.

**REPLY IN SUPPORT OF
MOTION FOR LEAVE TO
CONDUCT THE DEPOSITION
OF KIRSTJEN NIELSEN**

Plaintiffs submit this reply in support of their Motion for Leave to Conduct the Deposition of Kirstjen Nielsen (E.C.F. No. 302). Defendant opposes Plaintiffs' Motion because Ms. Nielsen purportedly does not possess "unique, first-hand knowledge unavailable from any other source and [which] is essential to the plaintiffs' claims." *See* E.C.F. No. 315 at 1. To the contrary, the extensive record in this case and Ms. Nielsen's public statements provide ample evidence of her unique knowledge—

. Plaintiffs' Motion should be granted.

I. ARGUMENT

A. *In Re U.S. Dep't of Education* is Inapplicable.

Relying on *In Re U.S. Dep't of Educ.*, 25 F.4th 692, 704 (9th Cir. 2022), Defendant argues that Plaintiffs are not entitled to depose Ms. Nielsen unless Plaintiffs can "show

1 that the Cabinet official possesses information that is *essential* to their claims and that is
 2 *not obtainable from another source.*” E.C.F. No. 315 at 7 (citing *In Re U.S. Dep’t of*
 3 *Educ.*, 25 F.4th at 702) (emphasis in original). But as Plaintiffs explained in their Motion,
 4 *In Re U.S. Dep’t of Educ.* is inapplicable to the dispute before the Court. That case
 5 involved review of an agency action under the Administrative Procedure Act (“APA”),
 6 which is generally limited to the administrative record absent a showing of agency bad
 7 faith. *See U.S. Dep’t of Educ.*, 25 F.4th at 700. There, the court considered whether
 8 separation of powers allowed for the extra-record deposition of an agency secretary when
 9 reviewing an agency action under the APA. *Id.* at 702. To allow a deposition in a case
 10 brought under the APA, the Ninth Circuit required: “(1) a showing of agency bad faith;
 11 (2) [that] the information sought from the secretary is essential to the case; and (3) [that]
 12 the information sought from the secretary cannot be obtained in any other way.” *Id.* The
 13 Ninth Circuit expressly noted that this test “rest[s] on a constitutional foundation, and *we*
 14 *see our analysis in this opinion as distinct from the ‘apex doctrine.’” Id.* at 700 n.1
 15 (emphasis added). Because Plaintiffs’ claims arise under the FTCA, not the APA, *In Re*
 16 *U.S. Dep’t of Educ.* does not control.¹

17 Defendant also contends that “constitutional separation-of-powers principles are
 18 implicated when litigating parties attempt to ascertain the thoughts and mental processes

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 20 ¹ Although the test set forth in *In Re U.S. Dep’t of Educ.* is inapplicable here, Plaintiffs
 21 also meet this standard as Plaintiffs have alleged intentional misconduct on the part of the
 22 government, that the information sought is essential to the case, and that the information
 23 sought cannot be obtained through other depositions or means of discovery. *Compare*
 24 *C.M. Compl.* (E.C.F. No. 1) ¶ 27 (alleging that the government instituted the family
 25 separation policy “to deter individuals from seeking asylum or otherwise coming to the
 26 United States” and “to deter immigration by harming families through the forcible
 27 separation of parents and children”), *with State v. United States Dep’t of Com.*, 333 F.
 28 Supp. 3d 282, 289 (S.D.N.Y. 2018) (finding that a deposition of then-Secretary of
 Commerce Wilbur Ross was appropriate where plaintiffs “plausibly allege[d] that an
 invidious discriminatory purpose was a motivating factor in the challenged decision” to
 add a citizenship question to the decennial census and that such a motive would be
 indicative of bad faith or improper behavior), *vacated as moot*, 351 F. Supp. 3d 502
 (S.D.N.Y. 2019), *aff’d in part, rev’d in part and remanded sub nom. Dep’t of Com. v.*
New York, 139 S. Ct. 2551 (2019).

by which high-ranking government officials exercise their official discretion.” E.C.F No. 315 at 6 (citing *United States v. Morgan*, 313 U.S. 409, 422 (1941)). Yet Defendant’s argument again rests on a case involving review of an agency action under the APA, which is not at issue in this litigation. Here, Plaintiffs have brought claims for negligence and intentional infliction of emotional distress under the FTCA and state law. Plaintiffs are not challenging the DHS Policy under the APA, and as such are not limited to an administrative record. Plaintiffs, therefore, are entitled to discovery regarding the intent behind the implementation of the Policy, which necessarily involves probing the mental processes of the officials involved in developing and implementing the Policy.

Plaintiffs’ request to depose Ms. Nielsen is properly subject to the apex doctrine. Under the apex doctrine, the Court must assess “(1) whether the deponent has unique first-hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods.” *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012); *see also Coleman v. Schwarzenegger*, 2008 WL 4300437, at *3 (N.D. Cal. Sept. 15, 2008) (to meet their burden, plaintiffs must show that proposed high-ranking deponents “possess personal knowledge of facts critical to the outcome of the proceedings and that such information cannot be obtained by other means”). Because Plaintiffs have established that Ms. Nielsen has unique first-hand, non-repetitive knowledge of the facts at issue in the case and have exhausted other less-intrusive discovery methods, her deposition should be allowed.

B. Ms. Nielsen Has Unique First-Hand, Non-Repetitive Knowledge Of The Facts At Issue In The Case.

Defendant argues that Plaintiffs “have not demonstrated that Ms. Nielsen possesses unique, personal knowledge” justifying her deposition in this case. E.C.F No. 315 at 8–9. Defendant’s position is not supported by the record, especially in light of the public statements made by Ms. Nielsen, [REDACTED]

1 As an initial matter, Defendant attempts to downplay the significance of Ms.
2 Nielsen's public statements regarding the DHS Referral Policy by arguing that "[t]he
3 government's interest in protecting Cabinet officials from deposition regarding their
4 official actions is not changed by the official's decision to offer non-sworn commentary
5 on a policy or issue after leaving office." E.C.F. No. 315 at 13–14. Where a proposed
6 apex deponent has made public statements about the facts at issue in a case—as Ms.
7 Nielsen has done here—courts have found that those statements suggest that the deponent
8 has unique, firsthand knowledge. *See, e.g., Ahlman v. Barnes*, 2021 WL 1570838, at *7–
9 8 (C.D. Cal. Mar. 9, 2021) (allowing the deposition of a Sheriff because "[i]n looking at
10 Sheriff Barnes's public statements as a whole, it is clear that he was not only involved in
11 setting COVID-19 related policies within the Orange County Jail, but he also has personal
12 knowledge of how COVID-19 is impacting the Orange County Jail"); *In re Valeant*
13 *Pharm. Int'l, Inc. Sec. Litig.*, 2021 WL 3140030, at *12 (D.N.J. July 7, 2021) (allowing
14 an apex deposition where the proposed high-level employee "possesses superior or unique
15 information relevant to the issues being litigated" and made "public statements [that]
16 revealed additional information about the alleged prior misstatements . . . [which] are
17 relevant to these cases."). Ms. Nielsen chose to voluntarily make public statements about
18 her role in the development and implementation of the DHS Referral Policy after she
19 resigned as the Secretary of DHS. Those public statements, [REDACTED]
20 [REDACTED] demonstrate that she has unique, non-repetitive
21 knowledge regarding the concerns she had about DHS's ability to implement the policy;
22 the factors that led her to ultimately sign the policy; and her understanding of the risks
23 associated with implementing the family separation policy, including the risk of
24 psychological harm that would result from separating families. Accordingly, Plaintiffs
25 should have the opportunity to depose Ms. Nielsen to obtain her understanding of events,
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27
28

1 and this Court should have the opportunity to weigh testimony of each relevant individual
2 when determining the issues in this case.²

3 One rationale of the apex doctrine is that “high ranking government officials have
4 greater duties and time constraints than other witnesses and . . . , without appropriate
5 limitations, such officials will spend an inordinate amount of time tending to pending
6 litigation.” *Givens v. Newsom*, 2021 WL 65878, at *4 (E.D. Cal. Jan. 7, 2021) (citation
7 omitted) (alterations in original). However, the apex doctrine applies “with *less force*
8 when the proposed deponent is not currently serving in office. For instance, there is no
9 longer a concern that requiring the person to sit for a deposition will pull them away from
10 other duties of public service.” *Id.* at *8 (emphasis added); *see also Sec. & Exch. Comm’n*
11 *v. Comm. on Ways & Means of the U.S. House of Repres.*, 161 F. Supp. 3d 199, 249
12 (S.D.N.Y. 2015) (“[T]he fact that [the party is] not [a] current high-ranking official[] is a
13 factor when considering whether the information can be obtained through less
14 burdensome means and whether the deposition will interfere with the official’s
15 government duties.”). Here, Ms. Nielsen is no longer a government official.

16 Moreover, although Defendant argues that “the Ninth Circuit has never permitted
17 the deposition of a current or former Cabinet official,” E.C.F. No. 315 at 6, this has no
18 bearing on whether the deposition of Ms. Nielsen should be permitted in this case because
19 Plaintiffs have met their burden for allowing the deposition under the apex doctrine.
20 District courts in the Ninth Circuit have allowed depositions of high-ranking government
21 officials, including the deposition of James Mattis, the Secretary for the Department of
22 Defense. *See, e.g., Karnoski v. Trump*, 2020 WL 5231313, at *5–6 (W.D. Wash. Sept. 2,
23 2020)³; *Coleman*, 2008 WL 4300437, at *3. In fact, Plaintiffs’ request to depose Ms.

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25 ² Under the FTCA, there is no right to a jury trial, and the claims at issue will be
26 determined after a bench trial. *See* 32 CFR § 750.32(b) (citing 28 U.S.C. § 2402).

27 ³ Because *Karnoski* was brought under the APA, Plaintiffs were not allowed to inquire as
28 to Secretary Mattis’s “mental processes” during his deposition. As noted above, this is
not an APA case, and such limitation does not apply here. To the contrary, the “mental
processes” of high-level government officials is a critical issue in the case.

1 Nielsen is analogous to the plaintiffs’ request to depose General Paul J. Selva in *Karnoski*.
 2 There, the plaintiffs sought to depose General Selva, who was “personally involved in the
 3 decision to delay implementation” of a policy concerning transgender individuals in the
 4 military. *Karnoski*, 2020 WL 5231313, at *2. The court in *Karnoski* allowed the
 5 deposition to proceed because the documents did not answer the plaintiffs’ questions and
 6 other witnesses could not speak to General Selva’s role and ultimate decisions—only
 7 General Selva could testify to those facts. *Id.* at *5.

8 **1. Ms. Nielsen Is the Only Individual That Can Testify as to Why**
 9 **She Approved the DHS Referral Policy**

10 Defendant argues that Ms. Nielsen is not the only individual that can testify as to why
 11 she approved the DHS Referral Policy. E.C.F. No. 315 at 9. To support this
 12 argument, Defendant relies on [REDACTED]

13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED] *Id.* [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]

22 Moreover, as detailed in Plaintiffs’ Motion, [REDACTED] as
 23 well as Ms. Nielsen’s previous congressional testimony, conflicts with Ms. Nielsen’s
 24 recent public statements about her decision to implement the DHS Referral Policy—
 25 which further demonstrates Ms. Nielsen has unique first-hand knowledge of key issues in
 26 this case. For example, Ms. Nielsen recently stated in the media that (a) Mr. McAleenan
 27 pressured her to authorize the DHS Referral Policy, (b) that she trusted his assurances
 28 about the policy and, (c) in retrospect, wishes she had not done so. *See* E.C.F. No. 302-6

(Ex. J (Dickerson, *An American Catastrophe: The secret history of the U.S. government's family-separation policy* at 74–75)). [REDACTED]

[REDACTED]

Further, while Ms. Nielsen staunchly defended the DHS Referral Policy during her congressional testimony, she recently stated that she wishes she had not signed the DHS Referral Policy. *See* E.C.F. No. 302-6 (Ex. J (Dickerson, *An American Catastrophe: The secret history of the U.S. government's family-separation policy* at 74–75)). And, as discussed in more detail below, Ms. Nielsen's statement on the record that she never received answers to her questions about the government's capacity to carry out the Policy [REDACTED] *See infra* at I.B.2.

Notably, a district court in the Ninth Circuit recently allowed the deposition of a high-level government official, under the apex doctrine, where that official made public statements that contradicted deposition testimony elicited in the matter. *See Ahlman*, 2021 WL 1570838, at *7–8 (“In looking at Sheriff Barnes's public statements as a whole, it is clear that he was not only involved in setting COVID-19 related policies within the Orange County Jail, but he also has personal knowledge of how COVID-19 is impacting the Orange County Jail. . . . APlaintiffs have pointed out, Plaintiffs have deposed numerous 30(b)(6) witnesses on the topics that Plaintiffs identified but have faced factual inconsistencies. . . . Consequently, the Court disagrees with Defendants and will permit Sheriff Barnes's deposition.”). Given the contradictions between the [REDACTED] congressional testimony, and Ms. Nielsen's public statements, Plaintiffs should have the opportunity to depose Ms. Nielsen.

2. Ms. Nielsen's Understanding of the Operational Limitations, Prior to Implementing the DHS Referral Policy Is Relevant to Plaintiffs' Claims

Defendant next argues that “because Secretary Nielsen was not involved in the implementation of the DHS Referral Policy, her understanding of those operational

1 processes cannot be essential to Plaintiffs' claims." *See* E.C.F No. 315 at 11. Defendant
2 misses the mark on this argument for several reasons.

3 Plaintiffs dispute that Ms. Nielsen was not involved in the implementation of the
4 DHS Referral Policy—she was, after all, the head of the agency responsible for the Policy
5 and issued a memorandum to DHS personnel ordering the implementation of the DHS
6 Referral Policy. [REDACTED]

7 [REDACTED]
8 Importantly, her deposition is needed to determine whether, and to what extent, she
9 considered the harm that would be inflicted upon Plaintiffs due to the government's
10 inability to, *inter alia*, (i) adequately house and care for the affected children, (ii) track
11 parents and children who were separated, (iii) and reunify separated families. And, again,
12 Ms. Nielsen's recent public statements highlight the necessity of this testimony.
13 Specifically, Ms. Nielsen told reporters that she did not think she had enough information
14 to make a decision on the family separation proposal, including because she never
15 received answers to her questions about whether Border Patrol stations had capacity to
16 house additional migrants, whether the Justice Department had enough lawyers to take
17 on extra cases, and what would happen to the children while the prosecutions were being
18 carried out. *See* E.C.F No. 302-6 (Ex. J (Dickerson, *An American Catastrophe: The*
19 *secret history of the U.S. government's family-separation policy* at [REDACTED])

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28

1 **3. Ms. Nielsen’s Knowledge of the Harms that Would Result from**
 2 **the DHS Referral Policy, Prior to Implementing the DHS**
 3 **Referral Policy, Is Relevant to Plaintiffs’ Claims**

4 Defendant argues that “in light of other information that is available,” “Plaintiffs
 5 have not shown and cannot show a need for Secretary Nielsen’s testimony” regarding
 6 “her purported knowledge of alleged potential harm resulting from family separations.”
 7 *See* E.C.F No. 315 at 13. The “other information” Defendant relies upon to support this
 8 argument is [REDACTED] as well as Ms. Nielsen’s congressional
 9 testimony. *Id.* Defendant’s reliance on [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]

14 [REDACTED] Moreover, Ms. Nielsen’s Congressional Testimony is in direct conflict with [REDACTED]
 15 [REDACTED] When Ms. Nielsen was asked “[w]hen you officially began family
 16 separation in spring 2018 were you aware of research showing it causes trauma that can
 17 do both immediate and long-term damage to children’s health?” Ms. Nielsen responded
 18 that “[t]he information that I was aware of at the time was that the trauma is from part of
 19 the journey to come up to the border illegally.” *See* E.C.F No. 315-4 at 41–42. Neither
 20 [REDACTED] nor Ms. Nielsen’s congressional testimony establish that Plaintiffs
 21 have received information on this topic—in fact, it highlights the necessity of asking Ms.
 22 Nielsen, herself, about this issue, given the contradictions between [REDACTED]
 23 and her congressional testimony.

24 **C. Plaintiffs’ Deposition of Ms. Nielsen Should Not be Limited in Duration**
 25 **or Scope.**

26 Relying upon two cases, Defendant makes the sweeping conclusion that “[o]n the
 27 rare occasions where courts have permitted the deposition of high-ranking government
 28 officials, they have imposed significant time and content limitations.” ECF No. 315 at

14 (citing *Kob v. Cnty. of Marin*, 2009 WL 3706820 (N.D. Cal. Nov. 3, 2009); *Odom v. Roberts*, 337 F.R.D. 359 (N.D. Fla. 2020)). But neither case imposed “significant time and content limitations.” The court in *Kob* did not place a time limit on plaintiff’s deposition of Marin County’s President of the Board of Supervisors, 2009 WL 3706820, at *4, and the court in *Odom* did not limit the topics for plaintiff’s deposition of the county Sheriff, 337 F.R.D. at 365–66. And both cases involved current officials, whose performance of their official duties could be overwhelmed by preparing and sitting for excessive depositions—a concern that does not apply to a former official such as Ms. Nielsen. *See Odom*, 337 F.R.D. at 363.

In fact, both *Kob* and *Odom* support Plaintiffs’ request to depose Ms. Nielsen. In each case, the court allowed plaintiffs to depose the officials about their “unique and personal knowledge” that plaintiffs could not otherwise obtain. *Kob*, 2009 WL 3706820, at *4; *see also Odom*, 337 F.R.D. at 365 (“Here, Odom has demonstrated that Roberts likely has information from first-hand experiences, which no other witness likely would possess.”). Plaintiffs have similarly demonstrated that Ms. Nielsen has unique and personal knowledge, and Plaintiffs should be allowed to depose Ms. Nielsen on these topics that cannot be obtained from other witnesses.

II. CONCLUSION

Based on the aforementioned reasons, Plaintiffs respectfully request that the Court grant Plaintiffs’ motion for leave to conduct the deposition of Ms. Nielsen.

Respectfully submitted this 21st day of November, 2022.

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